

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**Clifton Phillips,
Petitioner**

v.

**Roy A. Girdich, *Superintendent*,
Respondent**

03 Civ. 3317 (SCR)(MDF)

DECISION AND ORDER

Petitioner filed a petition for a writ of habeas corpus on May 9, 2003. The case was assigned to me in September 2003 and referred to Magistrate Judge Lisa Margaret Smith in January 2004. On or about September 21, 2004, Magistrate Judge Smith issued her Report & Recommendation (“R&R”), recommending that the Petitioner’s habeas petition be denied in its entirety.

My chambers received copies of Petitioner’s hand-written objections to the Report & Recommendation in October, 2004. For reasons unknown to this court, these objections were not formally filed with the clerk of this court and therefore did not appear on the case’s docket. In addition, Petitioner has acknowledged that he did not serve counsel for the Defendant with copies of his objections, and claims that he was unaware of his obligation to do so. In July, 2005, the Defendant indicated that it objects to Petitioner’s request to formally submit objections after the deadline. Nevertheless, given that my chambers has records of having received Petitioner’s objections in October, 2004, and in light of the latitude that this court typically accords *pro se* and incarcerated litigants, this court accepts Petitioner’s objections as timely filed. To the extent he has not already done so, Petitioner must immediately serve the Respondent with a copy of his objections.

In June 2004, Petitioner filed a *Writ of Error Coram Nobis* in New York State court, asserting ineffective assistance of appellate counsel. Petitioner’s writ was denied in November,

2004. Petitioner appealed, and his appeal was denied in December 2004. In February 2005, Petitioner moved to amend his already filed petition for habeas corpus to include his now-exhausted *Writ of Error Coram Nobis*.

Petitioner's motion to amend his habeas petition to include a new claim for ineffective assistance of appellate counsel is GRANTED. *See Serrano v. Burge*, 2005 U.S. Dist. LEXIS 18024, at *10-*11 (S.D.N.Y. 2005) (granting motion to amend habeas petition to include a claim for ineffective assistance of appellate counsel, and finding that the claim is not time-barred because it relates back to the original pleading).

The case is referred back to Magistrate Judge Smith for an amended Report & Recommendation to include a review of Petitioner's claim for ineffective assistance of appellate counsel.¹

It is so ordered.

White Plains, New York
Dated: September 7, 2005



Stephen C. Robinson
United States District Judge

9/8/05

¹ This court expects that Judge Smith will ensure that both parties have an appropriate opportunity to address Petitioner's amended petition.